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Weighted Words: The Implications of Naming on Gay Unions

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Introduction

Language Is Vital to Americans' Understanding Of The World And People In It

The breadth of a language is the capacity its people have to communicate ideas. Those who speak a language are both empowered by its words and limited by them. Names given to items, policies, and people are enduring and pervasive. The historical connotations of names persist long after the events upon which they are based have past. The American government is a secular one, governed by the principle of a state independent of religion. Despite efforts to the contrary, the United States of America did not, simply by declaring it to be so, sever its connections with religion in government. The words of the founders' origins in the nations of Europe remain in the American English language today, and among them are religious institutions continuing in a secular nation.

The movement for legal "gay" marriage has posed significant naming difficulties throughout the states. Several of the states have created a substantively identical institution with a different name. "Civil unions" and "domestic partnerships" claim to offer homosexual citizens with an equal opportunity, but do so under a different title. Lacking the same rhetorical history as "marriage," these institutions are fundamentally unequal regardless of their substantive

qualities.[1] The titles, "civil unions" and "domestic partnerships," are both descriptively appropriate and accurate. "Marriage," however, has a rich religious history and connotation. Marriages and unions in America are practical institutions with regard to the government. With them come health benefits, tax implications, and significant financial consequences. Such institutions, undertaken for secular purposes should have appropriately secular names. Secular titles would reorient Americans' understanding of "marriage" and state-sanctioned unions and put all similarly situated individuals on a level playing field.

The Rhetorical History Of Homosexuality

Nearly one hundred and fifty years after the Thirteenth Amendment declared all US citizens to be equal, discriminatory words about individuals of different races, sexes, and sexual orientations remain. Laws change slowly; over the past century and a half amendment, statutes, and court decisions have gradually attempted to ensure that all citizens are indeed equal under the law. Language changes more slowly. American English still features words entrenched with the invidious discrimination of the past several centuries of the United States of America.

Throughout history homosexuality has endured a challenging rhetorical history. For much of modern history it was not discussed by name at all. By failing to name and discuss a homosexuality, people's lives were invalidated and marginalized. No name at all, no acknowledgment whatsoever is a complete disregard of a person's identity. This lack of recognition put gay Americans centuries behind in terms of their ability to put themselves on equal footing with heterosexuals because people were largely unaware of their existence and

[1] Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497 (2005).

identities. Other groups, such as racial minorities and marginalized women have undergone equally painful discrimination, but were availed of a name and title to fight against it. A group with now acknowledgement at all can hardly fight for rights.

It was not until the 19th century that the definition of "gayness" became one based on an identity as opposed to an acts based definition.[2]

> What for centuries had been thought of as a multivalent sexual flux, a polytropic wandering inherent in all flesh, in every body, would be effectively arrested by a kind of taxonomic freeze-framing; the fluid vagrancies of the flesh would be crystallized into discrete and hermetic categories, especially into sexualities whose disjunctiveness would be determined along the axis of object choice: either the homo or the hetero.[3]

Here Craft discusses the transition that the concept of gayness underwent. Although for most of history it was perceived to be an act that might be undertaken by any individual, part of a fluid sexuality existing in all people, it later became a distinct identity.[4] Craft further explains that once that transition occurred, the categories became concrete and ones of polar opposition. One of the most important parts of the transition, however, was that along with it came the idea that these categories, the homo and the hetero, were thought to be determined by the affirmative choice of the individual.[5] It was an unavoidable consequence of this binary system that homosexual individuals were regarded as less than heterosexuals because normal family life was firmly rooted in heterosexual relationships.

When gayness was acknowledged, a fight to reverse the discriminatory effects of hetero-normativity began. A host of derogatory terms were created and gained prevalence because once

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[2] Laura I. Appleman, *Oscar Wilde's Long Tail: Framing Sexual Identity in the Law*, 70 MD. L. REV. 985, 1004 (2011).
[3] CHRISTOPHER CRAFT, ANOTHER KIND OF LOVE: MALE HOMOSEXUAL DESIRE IN ENGLISH DISCOURSE 5 (1994).
[4] *Id.*
[5] *Id.*

a binary approach was taken, the homosexual became the other.[6] The establishment of the homosexual as the other lead to the criminalization of homosexual acts.[7] [8] These terms singled out and attacked homosexual people. They reflected a deep misunderstanding of the lives of gay Americans. As the AIDS epidemic took hold, it was designated as a gay disease. Informally the disease was called the "gay plague."[9] In the early 1980s it was referred to as GRID, or gay-related immune deficiency in the medical community. The name was proposed as the disease's official designation. Slang terms used by ordinary citizens can have a significant impact on the perception of a discrete group of individuals, however, in the case of AIDS as a homosexual disease, the designation was validated and in part created by those in authority.[10] Following the outbreak of AIDS, gay Americans were further designated as reckless and dangerous, and this was recognized by the medical community, an institution of great respect and power to whom the American people are largely obedient.

The initial naming and perception of AIDS not only marginalized homosexuals, but it worked to seriously hinder AIDS prevention and treatment for heterosexuals. Heterosexuals with AIDS were assumed to be gay and there was not widespread support for research and

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[6] Appleman, *supra* note 2.

[7] Statutes criminalizing even consensual homosexual sodomy were prevalent through the majority of the twentieth century. The practice was confirmed and validated through the Supreme Court decision in *Bowers v. Hardwick*. These laws were not ruled unconstitutional until *Lawrence v. Texas*.

[8] *See* Daniel Dunson, *A Right to A Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 ALB. GOV'T L. REV. 552, 564 (2012).

[9] Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7 (1997).

[10] The Supreme Court of California recognized the importance official endorsement of linguistic difference in *In Re Marriage Cases.* "Because of the widespread disparagement that gay individuals historically have faced, it is all the more probable that excluding same-sex couples from the legal institution of marriage is likely to be viewed as reflecting an official view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples." In re Marriage Cases, 183 P.3d 384, 402 (Cal. 2008).

funding as people afflicted with the disease were thought to be suffering for their own sexual sins.[11] The perception of AIDS as a gay disease has continued to this day and still fosters a misunderstanding of the deadly disease affecting millions. "Labelled 'divine retribution' and the 'gay plague,' AIDS is linked with homosexual promiscuity and illegal drug use. More generally, the disease is associated with the defiance of both normal family life and socially approved forms of sexuality."[12]. Dolgin's point regarding AIDS and its association with defiance of societal norms is broadly applicable. That understanding of AIDS is also the understanding of gayness generally as well as institutions associated with homosexuality.

The gay community has been referred to casually by a number of derogatory words. Homosexuals have been, and continue to be called "fags," "queens," and "pansies" among other particularly inappropriate and graphic terms. One of the most telling instances of slang used is the term "queer." "Queer," by definition means strange or odd. Although the definition does not explicitly say anything negative about homosexuals, it denotes difference.[13] It, like many of the facially neutral terms referring to homosexuality, asserts that the entire gay community is somehow different from heterosexual Americans. Inclusion is vital in American society, evidenced by a term essentially meaning different becoming a pervasive derogatory term.[14] Difference is unequal.

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[11] Michael L. Closen, *HIV-AIDS, Infected Surgeons and Dentists, and the Medical Profession's Betrayal of Its Responsibility to Patients*, 41 N.Y.L. SCH. L. REV. 57 (1996).
[12] Janet L. Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193 (1985).
[13] *Id.*
[14] "In a society where civil recognition of the state carries such weight, this statement maintains a distinction between same-sex and opposite-sex couples in the law, even as it confers legal rights, benefits, and responsibilities on same-sex couples. This distinction is reflected in the name distinction." Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425, 1471 (2009).

Difference has been used to subjugate minorities time and time again since America's founding. Native Americans, African Americans, gay Americans, and female Americans have all had their rights restricted based on their differences. Native Americans had a different religions, different languages, and different lifestyles than the Europeans who colonized North America. African Americans had a different skin color. Those differences have been persecuted throughout American history and highlighting them highlights that history. Although their differences are not visibly and publically evident, gay Americans have been targeted because they are attracted to the same sex, considered a deviation from normal.[15] Because that difference has been consistently attacked, drawing attention to it perpetuates the marginalization of gay Americans. The movement toward assigning gay unions a name other than marriage highlights their difference, a source of pain and persecution. Each time the American government and individuals in power explicitly contrast the homo and the hetero by linguistically putting the homo outside of ordinary language it endorses and supports the long standing history of marginalizing and minimizing homosexuality.

Historically Marriage Is A Religious Institution

Opponents of the legalization of gay marriage have argued against it on traditional grounds. That tradition, however, is a religious one. Allowing gays to marry is offensive to many individuals with Judeo-Christian beliefs because many sects believe the Bible (or Tanakh) explicitly denounces homosexuality. Although the United States has no state religion, the vast

[15] *Id.*

majority of Americans are of a Judeo-Christian background.[16] The history of that Judeo-Christian belief system is embedded in the founding of the nation and the hearts and minds of many of its citizens. In Ancient Israel, the birthplace of Judeo-Christian religion, Biblical laws governed marriage. The Five Books of Moses are the oldest text from Western society referring marriage. "The Lord God said, 'It is not good for man to be alone; I will make a fitting helper for him . . . . Hence a man leaves his father and mother and clings to his wife, so that they become one flesh."[17] Over time, the institution of marriage became an important component of Jewish law.

In order to protect the institution, Jewish law came to prohibit having "carnal relations with your neighbor's wife."[18] The Book of Proverbs outlines duties to be performed by a virtuous wife.[19] The Book of Numbers describes what should be done to an adulterous wife.[20] Americans' understanding and beliefs about religion is governed by their Judeo-Christian history. This view of marriage as religious continued with the establishment of the Christian religions. Christianity teaches that God is the author of marriage. The Christian church requires that a priest bless marriage in order for it to be valid. Church leaders strongly advocated this view as early as the Second Century.[21] The term marriage evokes a religious image, one of

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[16] Sharon E. Debbage Alexander, Romer v. Evans *and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261, 262 (2002).
[17] *Genesis* 2:18.
[18] *Leviticus* 18:20.
[19] *Proverbs* 31:10-31.
[20] *Numbers* 5:11-31.
[21] "Tertullian, an early father of the Christian Church, wrote in the Second Century that a marriage not solemnized in church was almost as bad as fornication." Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19, 26 (2007).

churches and synagogues, of priests and vows. The image is not unwarranted, in fact it is supported by centuries' old traditions, which are virtually inseparable from the institution.

Many believe that to allow gay marriage is to allow a group believed sinners to participate in an institution that is considered a fundamental part of Judeo-Christian practice.[22] "Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral."[23] In an effort to appease those opponents as well as homosexuals, a separate institution has been created to grant gays the same rights as others while being devoid of that tradition. "Civil unions" and "domestic partnerships" do not evoke the same religious imagery as "marriage" does.

The inability to separate the religious sacrament of marriage and the civil and secular institution of marriage is a dangerous, but understandable conflation of the issues. "Since marriage is a religious institution for many people, it is important to distinguish between religious concepts and the state-created institution of civil marriage. This distinction is especially important in a republic, where different religious beliefs flourish but one law governs all."[24] Couples can engage in a marriage recognized by only the state, only a church, or both. However, regardless of which groups choose to recognize a particular marriage (of heterosexual couples) it is given the same name when in fact the repercussions of such recognitions are vastly different. Heterosexual unions in the United States are given the same name of "marriage" regardless of whether they are performed and recognized by the state or by a religious institution. Because

[22] "Many sects of Judaism and Christianity considered homosexual activity and relationships as inherently sinful, and the laws of individual states reflected these religious views." Debbage, *supra* note 16, at 267.
[23] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 953 (Mass. 2003).
[24] Kindregan, *supra* note 21, at 25.

they are named the same thing and referred to in the same way, it is psychologically impossible for Americans to make the necessary distinction referred to by Kindregan above.[25] In more recent history, several states have chosen to adopt terms that evoke solely civil and secular images for those unions undertaken by homosexuals addressing those unions differently than those of heterosexuals.

The Establishment of Different, But Analogous Institutions

The establishment of such unions began in the 1980s with the term "domestic partnership."[26] These unions were the first formal recognition of gay relationships by the state. Such recognition made certain rights and benefits traditionally only available to wed heterosexuals, available to gay couples. Hawaii created a very limited institution for gay unions and named the spouses "reciprocal beneficiary." These terms are particularly cold and instead of highlighting a loving or intimate relationship they highlight the legal consequences of the unions. "Reciprocal beneficiary" denotes the ability of the beneficiary to partake in some of the benefits of the other, for instance health or death benefits. The term's denotation is accurate, indeed the law allowed the individuals to benefit reciprocally from one another. However, the term's connotation is professional and business sounding, lacking the warm appeal of marriage.

More recently the term "civil union" has joined "domestic partnership" as a dominant term in the field. "Civil unions" were established by the Vermont legislature following the decision in *Baker v. State*.[27] The court in *Baker* held that, the state could not deprive same-sex

[25] *Id*.
[26] *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1049 (2d ed. 2004); Poirier, *supra* note 14, at 1440.
[27] Baker v. State, 744 A.2d 864, 867-68 (Vt. 1999).

couples the rights and benefits conferred on opposite sex couples that marry.[28] The Vermont constitution has a common benefits clause, which is different than the standard equal protection clause found in most constitutions. It is under that clause that the Supreme Court of Vermont found that the state was constitutionally required to extend benefits. The clause reads, in pertinent part, "That government is… instituted for the common benefit…and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." The court went on to say that the nature, or title, of the institution afforded same-sex couples was the decision of the legislature.[29]

> We hold only that plaintiffs are entitled … to obtain the same benefits and protections … to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate…These include what are typically referred to as 'domestic partnership' or 'registered partnership' acts, which generally establish an alternative legal status to marriage for same-sex couples.[30]

The decision the court handed down in Vermont stopped short of extending marriage in name to same-sex couples. Inherent in the decision is the implication that the name of the union is not a integral part of the right and that giving that name to one group but not another does not place the former at an advantage. The Vermont decision and subsequent legislative response was the

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[28] *Baker* plaintiffs were three same-sex couples involved in long term relationships from between four and twenty-five years. They applied for and were denied marriage licenses before suing the state. *Id*.

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> Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Id. at 867.

[30] *Id*.

first to rule that while the law cannot deny the substantive rights of marriage to homosexuals, it is not necessary for the institution to be given the name "marriage."

The New Jersey Supreme Court made a similar ruling in *Lewis v. Harris*.[31] The New Jersey constitution does not have a common benefits clause such as the Vermont constitution. In *Lewis* the court found that the equal protection clause necessitated equal rights and benefits for same-sex couples. The court framed the issue as specifically about whether same-sex couples were entitled to the same rights as opposite-sex couples.[32] From the outset the justices stated that the case was not about the transformation of the definition of marriage. Later in the opinion, the court addressed the question of naming as the plaintiffs had argued that the distinction was analogous to "separate but equal legislation." The court made the same decision made in *Baker* and allowed the Legislature to make that determination. "Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples."[33] *Baker* and *Lewis* both found that it was not necessary to provide the name "marriage" in order to satisfy the need for equality. Evidenced by the opinions in those cases, the justices found that the rights and benefits were required but shied away from issuing a broad decision that would affect the public at large. Instead the decision allowed them to evade the controversy of gay marriage, but properly outfit same-sex couples with important rights. Their decision was very limited in that it

[31] Same-sex couples sued state officials alleging that failure to issue marriage licenses violated their privacy, due process, and equal protection rights. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).
[32] "In conducting this equal protection analysis, we discern two distinct issues. The first is whether committed same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples." *Id.* at 212.
[33] *Id.* at 221.

skirted an unpopular debate and allowed the Legislature to create an institution that only had an impact on the lives of homosexuals.

Other state courts have found otherwise. Massachusetts, California, and Connecticut all have state court decisions finding that gay "marriage" is constitutionally required. In California, under *In Re Marriage Cases* the court found that the name was a core element of the right applying strict scrutiny.[34] The court came to this conclusion after examining a number of factors. They first rejected the idea that excluding same-sex couples from the designation of marriage was necessary to afford those couples with all of the rights and benefits of opposite sex couples. After reaching that conclusion they determined that preserving the traditional definition and application of marriage was harmful to same-sex couples and their families both practically and because it suggested that those relationships were less valuable from an official standpoint. Most importantly, the court found that such a policy would be damaging more generally by implying that gay Americans were "second class citizens."[35] Therefore, they concluded that to provide the other substantive rights without the name is to deny complete equality.[36] The opinion, unlike those in Vermont and New Jersey, paid attention to and recognized the less tangible, but very real concerns created by language distinctions.[37]

[34] *In re Marriage Cases*, 183 P.3d at 401.
[35] *Id.*
[36] California Legislature passed Proposition 8 subsequent to the *Marriage Cases* holding. "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The Supreme Court of California held that the Proposition 8 legislature pre-empted the holding in *Marriage Cases.* The holding applied to all subsequent same-sex unions. Strauss v. Horton, 207 P.3d 48, 76 (Cal. 2009).
[37] Monte Neil Stewart, Jacob D. Briggs & Julie Slater, *Marriage, Fundamental Premises, and the California, Connecticut, and Iowa Supreme Courts*, 2012 B.Y.U. L. REV. 193, 194 (2012).

The Connecticut court in *Kerrigan v. Commissioner of Public Health*, applying intermediate scrutiny, decided the case similarly to the California court.[38] They found that under the Connecticut state constitution, failing to provide the name produced a cognizable injury.[39]

> The civil union law entitles same sex couples to all of the same rights as married couples except one, that is, the freedom to marry, a right that 'has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]' and 'fundamental to our very existence and survival.'[40]

The court focused on the fact that no matter the rights associated with "civil unions" they would never endow same-sex couples with the actual right to marry. Evident by the language of the opinion, the justices believed that actual marriage is a critical and important part of American social life. These state courts did not choose to stop short of transformational and comprehensive decisions. They took the additional step to provide a truly equal institution in every sense. In doing so they acknowledged discrimination that may exist in practice and that which may exist in the mind. That manner of understanding is necessary if same-sex couples can ever be put on equal footing with opposite sex couples.

Analysis

Name Isolation Harkens Back To History

The pain caused by naming differences is particularly sensitive with regard to homosexuals because of the history they have endured with respect to language. Thomas Aquinas wrote that he would not write about homosexual acts because the vice was

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[38] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008).
[39] See Poirier, *supra* note 14, at 1440 (examining the limitations of the cognizable injury holding).
[40] *Kerrigan*, 957 A.2d at 412.

unnameable.[41] The group was deprived of any identity whatsoever and as such they were not able to form a group at all. When the act of sodomy was discussed it was described as too heinous even think about. Homosexuals were merely people who engaged in acts that society felt were so repulsive they could not even be publicly denounced. By not naming the group at all, it was impossible for homosexuals to become accepted in society or improve their position, because they had no position. When something lacks a name in a language, it is completely invalidated. People do not even have a method of conveying the idea in a meaningful way. Human beings have been naming for thousands of years. A name gives a person a sense of identity, a sense of self, a sense that they as an individual are worth something. Failing to name has the opposite effect. It leaves people with out an identity, feeling as though who they are or what they do is nothing at all; is worth nothing and is so horrible that people cannot even talk about it.

Later, the group came to be identified as people with a homosexual identity, rather than merely a series of acts. Having a homosexual identity allowed gays to group together. Although society still staunchly rejected the identity as utterly abhorrent, gays were able to validate their identities through each other in a way that was impossible before. A formal identity, however, allowed societies to formally legislate against homosexuals. Sodomy was explicitly legislated against. Although there was a homosexual identity, it was still impossible for gays to be accepted in society because their sexual preference was a criminal act. Meanwhile, in America

[41] Cahill examines the religious history of homosexuality with regards to names. Her article contends that homosexuality's lack of linguistic recognition was deeply embedded in early society. "Sodomy…quite literally violated language…. If same-sex sex violated the norms of grammar,… how could one put that act into words without also doing the same?" Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why "Separate' Nomenclature for Gay and Straight Relationships Will Never Be "Equal'*, 97 GEO. L.J. 1155, 1159-60 (2009).

while the laws were making it illegal to be a homosexual those laws and opinions were further supported by the Judeo-Christian backgrounds of the citizens. People understood from all-important sources of authority, the state and the church, that homosexuality was sinful, criminal. During a time when church was the primary gathering place for people, and the source of all faith and understanding of right and wrong, the Bible, the most important religious document explicitly stated that homosexuality was not acceptable. Between the church and the state, homosexuality had a stigma, which could not be overcome.

Laws, which continue to separate homosexuals from heterosexuals, which continue to drive the difference between them, harken back to that history. By choosing to call unions "civil" for homosexuals and "marriage" for homosexuals, laws are choosing to continue the painful trend in naming homosexuality. In the past, the names that have existed have been representative of the disgust with which people regarded homosexuality. "Marriage" is a term with a religious past and a religious connotation. Refusing to include same-sex couples in it is a continuation of the stigma that attached to homosexuality by virtue of being explicitly called sinful in the Bible. If modern laws sustain that difference, endorse that difference, homosexuals will never completely overcome the shame that has traditionally been associated with the identity.[42]

Homosexuals, when named, have always been pushed outside the boundaries of what is considered normal with regard to their name and identity. To continue that tend is to actively remind gays and lesbians of the history that they have endured and the difficulty of obtaining rights. It reminds them of that harms that the failure to give and identity and the identity of

[42] *Id.* at 1159-60.

disgust have caused[43]. California in *In Re Marriage Cases* commented on the impact of giving marriage between same-sex couples a different name. Calling same-sex unions something different than marriage places gays and lesbians "outside of the common ... vocabulary of ... civic life."[44]

"Civil Unions" are Separate and Unequal

The linguistic history of homosexuality renders the difference in terms for homo and hetero institutions fundamentally unequal. The inequality has similarities with and thus should be viewed in light of the separate but equal doctrine established during the civil rights movement. In 1954 the Supreme Court of the United States declared in *Brown v. Board of Education* that separate was not equal declaring post-Civil War segregation to be unconstitutional. African American individuals had been provided with separate facilities for everything from schools to water fountains. An empirical evaluation of the separate facilities makes it clear that the facilities were separate, but were not equal. Teachers in schools for black children were less qualified, and black students were not afforded the same opportunities as those in white schools. The court, however, did not merely order states and localities to improve the quality of black facilities, instead they ruled that separate was not equal and could never be equal.[45] The separate, but equal doctrine is not limited to racial classification. The Supreme Court of Connecticut used the separate, but equal doctrine to evaluate the legitimacy of "civil union" laws. "If, however, the intended effect of a law is to treat politically unpopular or

[43] *Id.*
[44] *In re Marriage Cases*, 183 P.3d at 401-02.
[45] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 489 (1954).

historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine."[46]

In recent years several states have ruled that same-sex couples must be given the opportunity to obtain the same rights and benefits as married opposite-sex couples have access to. Some of them have granted those rights, but have continued to withhold the title of "marriage" itself. Withholding the title has some serious practical implications. State "civil union" and "domestic partnership" laws may purport to give all of the same rights, they do not always do so in practice. Employer benefits and services may not yet acknowledge the equality of "civil unions" and ordinary Americans may not understand their significance. Aside from the practical implications that remain, there are enduring perceptional implications. "Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' As we have explained, the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not."[47] While it is a sign of progress that a marginalized group has been able to obtain much needed rights, the failure to include the name in the institution has created a separate, but unequal problem.[48]

Linguistic Segregation Poses a "Separate But Equal" Issue

Physical separation and linguistic separation have similar implications. Racial segregation physically separated whites and blacks from each other, while homosexual rhetoric only creates a linguistic separation; however, the two types of separation create many of the same problems. Placing black children in different schools was a problem because the teachers

[46] *Kerrigan*, 957 A.2d at 412.
[47] *Id.* at 418.
[48] Cahill, *supra* note 41, at 1159-60.

were not as good and the same opportunities were not as good, but that was not the only reason the court ruled that separate was not equal. The tangible concerns created by separate facilities are unique to physical separation, but they are not the core issue. Tangible concerns can theoretically be remedied. Teachers can be trained, playgrounds can be built, and school buildings can be improved. The portion of segregation that could not be remedied, practically or theoretically, is the perception created by separation. Separate could never be equal because by putting the students in different schools, the state created the perception that black children are not as good as white children, the perception that they are not fit to be educated alongside white children, the perception that they are not as intelligent as white children.[49]

The problem of perception is equally present in the rhetoric of homosexual unions. There may not be tangible concerns, buildings to be built or people to be hired, but the core issue is the same. By naming the unions of same-sex couples and opposite sex couples something different, the state creates the perception that same-sex couples are not as good as opposite-sex couples, the perception that they are not fit to be named alongside opposite-sex couples, the perception that they are not as acceptable as opposite-sex couples. This perception cannot be remedied so long as there are different names for the institutions. It reflects a difference in treatment and perception that is visible to all who know of it.[50]

Segregation in education also had serious tradition implications. Even if the tangible problems were fixed, no matter how good the teachers were in black schools they did not have the same name recognition and historical clout as white schools. When white students received their diplomas and wrote their resumes they had the privilege of writing school names that every one had heard of, that everyone respected. Black students were deprived of that right. Their

[49] *Id.*
[50] *Id.*

schools had unknown names, marred by a history of painful discrimination and roots of slavery. [5152] Although the all-white schools had a tradition of only educating white students, protecting that tradition would have been at the expense of black students. The name of the schools was important, vital to the equality of black students' education.

In the same vein, the history and tradition of the term "marriage" is essential to understanding the inequality in naming unions differently. Even if the rights and benefits are mirror images, even if all of the tangibles are identical, the term will never have the same name recognition and clout as "marriage."

> Although the understanding of marriage as limited to a union of a man and a woman is undeniably the predominant one, if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. [53]

The California Court here, in *In Re Marriage,* addresses the heart of the issue. "Marriage," "civil unions," and "domestic partnerships" are not facially discriminatory in any way. They appear to be neutral terms, accurate in their application and use. However, as noted by the Court above, what appear to be impartial terms mask the inequality that gay individuals have been and are fighting against for years. Furthermore, the point the court makes here directly addresses and thus invalidates one of the most important arguments against gay marriage, tradition. The court acknowledges that opposite-sex couples may be the predominant or traditional understanding of

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[51] *See Brown,* 347 U.S. at 489.
[52] *See also* United States v. Virginia, 518 U.S. 515, 523 (1996) (finding that the historical clout and history of the Virginia Military Institute could not be matched through the creation of a new institution for women even if tangible and physical disparities were rectified).
[53] *In re Marriage Cases,* 183 P.3d at 401-02.

marriage, but that tradition and societal norms often conceal inequality. Opposite-sex couples get the benefit, the perception of the centuries old tradition of "marriage." Same-sex couples are deprived of that, and at the same time have to view their unions in direction comparison to the unions afforded opposite-sex couples. Furthermore, same-sex couples' different title is marred by the history of painful discrimination. Gay Americans have always been the other, strange, odd, and different. "Especially in light … undisputed history of invidious discrimination that gay persons have suffered…establishing a statutory scheme consigning same sex couples to civil unions… declar[ed] them to be unworthy of the institution of marriage."[54] When those in authority stand up and pass laws that say, homosexuals are different, their unions are different, they cannot be called the same, that difference is highlighted, that pain is remembered and endorsed by the government.

"Civil Unions" Lead to Different Classes of Citizens

The creation of two different forms of unions also serves to create different levels of citizens. Each institution is only available to one type of person; "marriage" is exclusive to heterosexuals and "civil unions" are exclusive to homosexuals. Because they are not named the same thing, the difference in naming signifies that there is some difference even if it is merely a nominal one. When an entire group of people does not have access to an institution, but have access to a differently named similar institution people are going to presume that one is better than the other. Heterosexuals have always been the majority; heterosexuality has been viewed as the "normal" and "ordinary" sexuality since an alternative has been acknowledged.

> Furthermore, because of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term

[54] *Kerrigan*, 957 A.2d at 417.

> "marriage" is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution that has been established for same-sex couples to be considered a mark of second-class citizenship.[55]

Moreover, the predominant religions in the United States of America reject homosexuality as sinful. Given these facts, that homosexuals are the minority and that a significant portion of the country regards the very identity as a sin, it is inevitable and natural that the people understand that "civil unions" are subordinate to "marriages." It is naïve to believe that simply by giving the institution an apparently neutral name and by giving it the same rights and benefits of "marriage" that it will be regarded as such.[56]

"Civil Unions" Will Never Be "Normal"

"Marriage" is the lens through which people have always understood unions. It has been the standard, the expectation of all, for generations. It has been the definition of what it means to be a normal adult in American society. Creating a law for same-sex "civil unions" is the law stating that same-sex couples will never fit that standard, that they will never be a normal part of American society. When the law stands up for the separation and marginalization of people it is far worse than when societies and communities do so informally. Laws must be repealed, amended, or overruled or else they remain in effect in perpetuity. They are carried out and enforced by the government. The distinction endorses discrimination against homosexuals. It reaches out to the people and tells them that in fact, there is a difference; that in fact they are not to participate in ordinary and normal institutions. "The statutory provisions that continue to limit access to this designation exclusively to opposite-sex couples — while providing only a novel,

[55] *In re Marriage Cases*, 183 P.3d at 401-02.
[56] Cahill, *supra* note 41, at 1159-1160.

alternative institution for same-sex couples — likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity."[57] The laws cannot erase prejudices and stereotypes, they must slowly disappear through societal acceptance, but they can never be erased so long as the government supports them. [58] [59]

Recommendations

Separate, Physical Or Linguistic Is Not Equal

Names are not chosen arbitrarily, and each has an inescapable story unforgotten each time it is used. Given the very nature of words, separate names are inherently unequal. They convey different histories, different etymologies, and different connotations that may endure for centuries. Those etymologies, histories, and connotations cannot simply be changed in the minds of the millions of speakers of American English. The remedy is to change the language used and to stop working within a skewed framework. Separation in any form is not equal. While there is a difference between physically separating two groups and calling their institutions different things, neither is equal. In fact, separating groups linguistically may have a more lasting impact. Facilities can simply be desegregated, and once they are there is physical equality. Words cannot be erased from the nation's rhetoric.

Names are vitally important to the perception of both people and institutions. They are the only method we have of identifying and recognizing people, institutions, and ideas. Equality

[57] *In re Marriage Cases,* 183 P.3d at 401-02.
[58] Federal law under the Defense of Marriage Act continues to define marriage as solely between a man and a woman and does not recognize same-sex unions for any purposes. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).
[59] The Defense of Marriage Act is currently under challenge at the Supreme Court of the United States awaiting the decision on appeal in *Windsor v. United States,* 699 F.3d 169, 182 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (U.S. 2012).

must be conveyed through equal words, the same words. Just as separate facilities cannot be made equal, different words cannot be made equal. No amount of rationalization can give "civil unions" the same history as an institution practiced since before the Common Era. The state courts of Vermont and New Jersey have found that same-sex couples are entitled to the same rights in terms of unions as opposite-sex couples. Naming the two institutions differently, however, serves only to further marginalize gay Americans and highlight their history of differences.

Universal Civil Unions As the Solution

Were states to call all unions, those between opposite-sex couples and those between same-sex couples, "civil unions" or something equally neutral such as "domestic partnerships," both the inequality between the current institutions and the religious concerns would be addressed.

"Civil unions" are the most accurate title to give to the unions the state authorized. The implications of state unions are just as the term implies. They have civil and secular consequences. State unions give spouses the ability to receive health benefits, state death benefits, and file joint state tax returns. They also standardize the process of dissolving the relationship, providing for divorce procedure as well as custody arrangements in many states. Those are the benefits that a state union confers, regardless of who if confers them upon. All of the unions that the state sanctions should be referred to as such.

Calling the union of opposite-sex couples and same-sex couples something different creates a strong implication that they are in fact something different. If they are different, and the name is the only distinction, the difference must therefore reside in the name. The differences

between "marriage" and "civil union" rhetorically are historical and traditional differences. Because marriage has a religious history, to allow that difference in naming continues, using that language in contrast to another institution is an endorsement of marriage as a religious institution. It is contrary to the principles of the foundation of the United States of America to finance and sanction a religious institution.

If the difference in naming is something other than an implicit endorsement of a religious institution, it must be an appeasement of the complaints of individuals entrenched in religious beliefs. There is no other rational explanation for its difference given that the institutions give both groups the same rights. A difference in naming makes sense when the underlying rights or protections are different. Absent that the variance is nothing more than an acknowledgment of the different meaning of the word. While that difference may make individuals uncomfortable, possibly for legitimate reason, the state cannot deny a right of its law-abiding citizens merely because it makes other citizens uncomfortable on religious or traditional grounds. To do so encourages the prejudices upon which those beliefs are based.

Naming the institutions differently cannot be supported by other arguments against same-sex marriage such as the idea that marriage is only for procreation. If that position is valid, it is an argument for why same-sex couples should not be given the rights that go with marriage, not the name marriage itself. Once the premise that states are under a constitutional requirement to provide the rights, those arguments are no longer in play.

Alternatively, religious individuals whose beliefs prohibit homosexuality and therefore same-sex marriage are entitled to their beliefs. A person of faith may reasonably consider marriage to be a vital and central component of their faith. The institution has been practiced since before the Common Era in the Judeo-Christian faith. It is understandable that they wish for

an institution that they strongly associate with their faith to be protected. Because the Bible has an explicit prohibition on homosexuality, prohibiting same-sex couples from marrying follows as a component of that. Additionally, religions and churches should be entitled to include and exclude individuals from their sacraments and ceremonies as they see fit. These are both valid concerns. Catholic churches, as well as all others, are entitled to recognize only the marriages they wish to. Mormon churches seal Mormon couples in a temple, and only then are the marriages recognized in the faith. Allowing all of these marriage traditions to continue is fundamental to American principles of freedom of religion.

To formally separate the civil and religious unions of couples would recognize all unions for state purposes and allow each religion to sanction only the marriages they see fit. Religions and churches would be given an exclusive on conferring marriage. Individuals of religious faith would not have their institution granted in name or otherwise to any individuals not authorized by a church. It would respect the authority of each church to make decisions regarding the union of its practitioners. Doing so would reduce the feeling that same-sex couples are invading their religious beliefs while still respecting the rights of all individuals.

Under this framework, same-sex couples would have the same rights and protections as all other couples. The federal equal protection clause as well as all similar clauses in state constitution requires that similarly situated individuals be afforded the same rights and protections. Same-sex and opposite-sex couples seeking union are similarly situated. They are the age of majority, they are in committed relationships, and they seek the legal benefits of union. Same-sex couples are equally able to lead successful lives, they are able to raise families, and they are able to contribute to society as a whole in the same ways that opposite-sex couples are able to. Denying them full equality on the basis of the traditional meaning of words is unfair

and unequal. Joining all couples under the same title is undeniably equal and logical. It cannot be seen to discriminate between minority and majority groups or to favor one religious group over another.

This system is both simple and straightforward. By calling all unions by the same name, there is no perception that there are differences between the two institutions. All citizens would be aware that any couple wishing to get married would be recognized in the same way according to the state and, as such, clearly afforded all of the same rights with regard to such a union. Although calling "marriages" and "civil unions" may not be facially discriminatory, it unquestionably appears to treat opposite sex and same sex couples differently. Even if both institutions bestow the same rights, there is a strong perception of inequality. While that perception may not put same-sex couples in different positions, it openly invites Americans to view homosexual Americans as different. Doing so perpetuates the history of persecution of differences and stifles the movement toward equality among those of different sexual orientations.

From a practical standpoint, adopting such a policy would be practical for the states. One type of union as opposed to two is less complicated for the issuing state. It would require fewer documents, less systems for filing and maintaining those documents, and an overall simpler scheme for uniting individuals. Additionally, making changes to rights would be easier as well. If the states are required to confer the same rights to all couples, altering the rights or benefits would necessitate making changes to multiple pieces of legislation if there are two types of unions. However, if all couples are united under one piece of legislation, that complication is avoided.

Adopting a universal civil union provision would eliminate the linguistic remnants of religious implications in what should be an exclusively civil institution. It would alleviate concerns that religious individuals might have of non-believers and non-conformers being given an inherently religious demarcation on their unions. Universal civil unions would be fundamentally equal to all parties both in their practice and perception as well as being simpler from a practical standpoint. It is the best solution for the majority, the minority, and the state itself.

Conclusion

The United States of America has an unfortunate history of discrimination. That discrimination has been endorsed through laws separating minorities, restricting their abilities to obtain the same benefits as the majority. Calling the union of same-sex couples something different than that of opposite-sex couples is a subtle continuation of the discrimination and unequal treatment of homosexual individuals throughout American history. Any difference, whether it be physical or linguistic, when it affects the basic rights of Americans is unequal. States such as Vermont and New Jersey have made great strides toward equality by requiring couples to receive the same substantive rights; however, the strides are insufficient to date. A move toward calling all unions "civil" would remedy this inequality and address the primary concerns of the opposition. America must promote the equality and rights of all of its people and must do so by staying true to the founding principles.